

DRAFT PREPARED FOR:  
Solicitation Notice for Comments Regarding an Economic Impact Analysis (EIA)

**ORDER OF THE STATE OF WISCONSIN  
NATURAL RESOURCES BOARD  
REPEALING, RENUMBERING, AMENDING, REPEALING AND RECREATING,  
AND CREATING RULES**

The statement of scope for this rule, WT-12-12, was approved by the Governor on May 29, 2012, published in Register 678 on June 14, 2012 and approved by the Natural Resources Board on June 27, 2012.

The Wisconsin Natural Resources Board proposes an order to repeal NR 106.13, 221.05, 225.05, 228.05, 231.05, 236.05, 239.05, 240.05, 245.05, 247.05, 250.05, 258.05, 261.14, 268.05, 269.05, 275.05, 276.05, 277.05, 280.05, 281.05, 284.13, 286.05, 290.13, 294.05, 295.05, and 296.05; to amend NR 106.117, 200.065 Table 1, 200.21, 205.01, 207 Chapter (title), 207.01, and 220.13; to create NR 106.08(6)(e), 200.07(5), 205.067, 205.09, 205.10, 205.14, 207 Subchapter I (title), 207 Subchapter II, and 220 Subchapter IV; all relating to the WPDES permits.

WT-12-12

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**Analysis Prepared by the Department of Natural Resources**

**1. Statutes interpreted:**

Sections 283.31, 283.33, 283.35, 283.37, 283.39, 283.41, 283.45, 283.49, 283.53, 283.63, 285.61, and 285.62, Stats.

**2. Statutory authority:**

Sections 227.11, 283.11, 283.31, 283.37, 283.39, and 283.41, Stats.

**3. Explanation of agency authority:**

Chapter 283, Stats. grants authority to the department to establish, administer and maintain a Wisconsin Pollutant Discharge Elimination System (WPDES). More specifically, ss. 283.11 and 283.31, Stats., provide authority to promulgate rules to administer the WPDES permit program consistent with federal requirements. The department has general authority to promulgate rules under s. 227.11 (2) (a), Stats., to administer the specific statutory authority granted in ch. 283, Stats.

**4. Related statute or rule:**

These rules relate directly to the WPDES permit program that regulates wastewater discharges. Related rules include all other rules that comprise the WPDES permit program and include Chapters NR 100 to 106 and 200 to 299, Wis. Adm. Code.

**5. Plain language analysis:**

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The purpose of the proposed rule changes is to ensure that the state's regulations are consistent with federal regulations. Minor clarifications and corrections will also be made to these chapters.

Specifically, the proposed rules will address Environmental Protection Agency's (EPA's) issues regarding New Source Performance Standards (NSPS), Expression of Limits in Permits when Permittee Disposes of Pollutants into Publicly Owned Treatment Works or by Land Application, General Reasonable Potential Procedures, Best Management Practices in Permits, General Compliance Schedule provisions, Permit Application Requirements for Industrial Dischargers, Permit Application Requirements for Intake Requirements for New Facilities, and Anti-backsliding Provisions. On July 18, 2011, the department received a letter from the EPA identifying 75 issues and potential inconsistencies with Wisconsin's authority to administer its approved WPDES permit program. This rule package proposes changes to chs. 106, 200, 205, 207, and 220. There have been several other rule packages initiated (and some finalized) to address the 75 issues. Issues were sorted into rule packages by subject matter or related requirements.

New Source Performance Standards (Issue 7):

This issue was addressed through an Attorney General's statement dated January 19, 2012, but this rule package proposes revisions to clarify the authority provided in state statutes as interpreted by the Attorney General's Office and as required under federal law. New Source Performance Standards (NSPS) are technology based effluent limitation guidelines (ELGs) that apply to new sources.

Where effluent limitation guidelines, including NSPS, for a given industrial category of dischargers are promulgated federally but do not exist in the Wis. Adm. Code, the department must include limitations based upon the federal ELGs in WPDES permits, in accordance with the date specified in federal law. Similarly, if federal ELGs for a given industrial category are more stringent than the state's promulgated ELGs, the state must include limitations based upon the federal ELGs. This proposed rule clarifies this federal requirement.

Reasonable Potential (Issue 11):

Under federal regulations (40 CFR s. 122.44 (d)), a state is required to include a water quality based effluent limitation in a permit for a pollutant in a discharge if there is reasonable potential for the discharge to cause or contribute to an exceedance of a water quality standard. Wis. Stats. s. 283.31 requires that WPDES permits contain water quality based effluent limitations (WQBELs) when necessary to achieve water quality standards. Existing state regulations establish reasonable potential procedures for toxic and organoleptic substances as well as for phosphorus in chs. NR 106 and 217, respectively. The proposed rule package expands these requirements to all pollutants, including whole effluent toxicity (WET), and to narrative standards as required under federal regulations. The proposed rules also delineate processes for determining what constitutes "reasonable potential" to exceed water quality standards and for establishing limits in the absence of state water quality criteria for specific pollutants.

Best Management Practices for Permits (Issue 13):

Best management practices (BMPs) are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. They can include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

Existing rules contain best management practice requirements for land application activities, storm water runoff, and runoff from Concentrated Animal Feeding Operations (CAFOs). However, the existing rules

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do not include a provision that requires best management practices in accordance with 40 CFR 122.44 (k).

The proposed rule requires that the department include best management practices (BMPs) in permits to control or abate the discharge of pollutants under certain circumstances. BMPs will be included when numeric effluent limitations are infeasible or when BMPs are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act.

Antibacksliding (Issue 14):

Pursuant to 40 CFR 122.44 (l), in any reissued permit, the water quality based effluent limitations, best professional judgment limitations, and interim limitations, standards, or conditions must be at least as stringent as those in the previous permit, with some exceptions. Existing rules contain antidegradation procedures to prevent lowering of water quality in surface waters unless necessary, but existing rules do not specifically contain the antibacksliding requirements in 40 CFR 122.44 (l).

Compliance Schedules (Issues 15 and 29):

Existing rules contain specific provisions for compliance schedules for toxic and organoleptic substances, ammonia, temperature, and phosphorus. The proposed rule expands the compliance schedule provisions to all appropriate situations, not just upgrades to meet limits for toxic and organoleptic substances, ammonia, temperature, or phosphorus. It also makes several minor changes to provisions for compliance schedules.

The proposed rules will include revisions to compliance schedule requirements in chapter 106 for consistency with 40 CFR 122.47 and with 40 CFR 132, Appendix F, Procedure 9 for Great Lakes dischargers. Proposed revisions will also add a new section for compliance schedule requirements to ch. NR 205 that applies to all limitations not already covered in ch. NR 106 or 217.

This rule package proposes to repeal s. NR 106.13, which is inconsistent with 40 CFR 122.47 in allowing compliance schedules where leachate from solid waste facilities affects the ability of a POTW to meet WQBELs for toxic or organoleptic substances.

Expression of Limits in Permits when Permittee Disposes of Pollutants into Wells or Publically Owned Treatment Works or by Land Application (Issue 20):

Pursuant to 40 CFR 122.50, for situations where an industrial permittee chooses to dispose of a portion of its wastewater to a POTW or to a land application site and the other portion to a surface water, the permittee's effluent mass limits for the portion discharged through the surface water outfall must be reduced proportionally to the flow of wastewater diverted to land or a POTW. Concentration limits remain unchanged.

The proposed rule codifies the department's current operating procedure and establishes consistency in state rules with federal regulations.

Expedited Variances (Issue 46):

Federal regulations at 40 CFR 122.21 (o) allow expedited variance procedures and time extensions for filing variance requests. The proposed rule allows the department to accept variance applications before a permit is reissued. This is an existing practice already allowed under s. 283.15 (2) (a), Wis. Stats.

Application Materials for Categories of Industries and New Sources and New Dischargers (Issue 61):

Section 40 CFR 122.21 contains permit application requirements for specific industrial categories of

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dischargers. The proposed rule requires additional permit application materials from the following categories of dischargers: existing manufacturing, commercial, mining, and silvicultural dischargers; aquatic animal production facilities; and new sources and new dischargers. This rule revision reflects current department requirements but will add specificity. The department already has authority in state rules and statutes to require any additional necessary information in a permit application.

**Fundamentally Different Factors Variances:**

The proposed rule offers the option to apply for a fundamentally different factors variance to all\* industrial categories of dischargers, whereas the Adm. Code currently offers this option to only 27 out of 47 industrial categories identified in ch. NR 220. This allows industrial dischargers flexibility when effluent limitation guidelines apply to their industrial category as a whole but are not specifically applicable to the given discharger because the discharger has fundamentally different factors.

\* Except that this does not apply to the BPT for steam electric power generation.

**6. Summary and comparison with existing and proposed federal regulations:**

Following the revisions contained in this rule package, the department rules will be consistent with existing federal regulations: 40 CFR 122.21 (g, i, k, and o); 40 CFR 122.44 (d, k, and l); 40 CFR 122.47; 40 CFR 122.50; 40 CFR 125.30-32; 40 CFR 132, Appendix F, Procedure 9; and Clean Water Act section 402 (o).

**7. Comparison of similar rules in adjacent states:**

All the other EPA Region 5 states (Illinois, Indiana, Michigan, Minnesota and Ohio) are subject to the EPA regulations that are delegated to the states for implementation. Wisconsin's rules for permit processing and other permit issuance procedures should essentially be the same as those in the other states.

**8. Summary of factual data and analytical methodologies:**

Not applicable.

**9. Analysis and supporting documentation used to determine effect on small business or in preparation of an economic impact analysis:**

[insert after Economic Impact Analysis (EIA)].

**10. Effect on small business:**

[insert after EIA].

**11. Agency contact:**

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SECTION 1. NR 106.08 (6) (e) is created to read:

**NR 106.08 (6) (e) *Exception to paragraph (a).*** WET Limits are not necessary where, upon written consideration of the factors listed below in the fact sheet, the department determines that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative water quality standards.

1. Existing controls on the discharge;
2. Controls on the pollutant discharged by nonpoint source pollution in the watershed;
3. The variability of the pollutant or parameter in the effluent discharged;
4. Sensitivity of species to toxicity testing when evaluating whole effluent toxicity as defined in s.

NR 106.03; and

5. Dilution of the effluent in the receiving water.

SECTION 2. NR 106.117 is repealed and recreated to read:

**NR 106.117 (1) *Schedules for first permit issuance.*** (a) The first permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with state or federal limitations promulgated after commencement of construction but less than three years before commencement of the discharge. The department may allow a brief period, not to exceed 90 days from the beginning of discharge, for the discharger to correct pollution control equipment start-up problems.

(b) For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with limitations promulgated less than three years before recommencement of the discharge.

**(2) *Schedules for reissued or modified permits.*** A reissued or modified permit may, when appropriate, include a schedule for compliance with new or more stringent effluent limitations that are established by this chapter. The schedule for compliance shall meet each of the following conditions:

- (a) *Time for compliance.*** The schedule shall be as short as reasonably possible and may not

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extend beyond any applicable federal or state statutory deadlines. The schedule also may not extend beyond 5 years from the date that the permit is reissued or modified to include the new or more stringent effluent limitation, except as provided in par. (c) or in other chapters.

**(b) *Great Lakes Dischargers.*** In permits for existing Great Lakes dischargers that are reissued or modified on or after March 23, 1997, if the effluent limitation is based on a secondary value, the permit shall require compliance with the secondary value based limitation within a reasonable period of time, no later than five years after permit reissuance or modification to include the limitation. The compliance schedule may allow the permittee additional time to conduct studies for the purpose of revising the secondary value or to develop a criterion if requested by the permittee in accordance with s. NR 106.07(8). The time period allowed for such studies may not exceed two years. In cases where the permittee wishes to conduct such a study on the secondary value, the permit also shall contain a reopener clause, requiring a permit modification if the department determines that the specified studies demonstrate that a revised limitation is appropriate. Any revised limit shall be incorporated through a permit modification and a reasonable time period, up to five years, may be allowed for compliance, but in no case may the compliance schedule for the revised limitation extend beyond 7 years from the date the secondary value based limitation was initially included in the permit.

**(c) *Interim Dates.*** If a permit establishes a schedule for compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement. If the time necessary for completion of any interim requirement is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

**(d) *Pollution and waste minimization measures.*** The schedule for compliance may require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation; and.

**(e) *Extension beyond permit expiration.*** If a permit is modified to include a limitation, the schedule for compliance may extend beyond the expiration date of the permit if an interim permit limit which is effective upon the permit's expiration date is included in the permit.

**(f) *Reporting.*** No later than 14 days following each interim date and the final date of compliance, the permittee shall notify the department in writing of its compliance or

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noncompliance with the interim or final requirements or, if paragraph (2) (c) 2. is applicable, submit progress reports.

**Note:** An interim permit limit is not necessarily a numerical effluent limitation.

**Note:** Compliance schedule provisions for TMDL-based limits, technology-based limits, and phosphorus limits may differ from the requirements of this section. These provisions can be found in ss. NR 212.75 (5), NR 205.14, and NR 217.17, Wis. Adm. Code, respectively.

SECTION 3. NR 106.13 is repealed.

SECTION 4. NR 200.065 Table 1 is amended to read:

**NR 200.065**

**Table 1**  
**Minimum monitoring requirements**

Wastewater Discharge Type	Number of Monitoring Tests	Pollutants Required to be Monitored
Major municipal discharge	1	Pollutants listed in s. NR 215.03 excluding asbestos, 2-chloroethyl vinyl ether and dioxin; pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1
	4	Copper, ammonia, phosphorus and hardness
	1	Chloride and whole effluent toxicity
	1	
Minor municipal discharge	4	Copper, ammonia, phosphorus and hardness
	1	Chloride, arsenic, cadmium, chromium, lead, nickel and zinc
Primary industry process discharge	1	Pollutants listed in s. NR 215.031 excluding asbestos, 2-chloroethyl vinyl ether and dioxin; pollutants listed in ch. NR 105 <sup>1</sup> , Tables 1 through 9 excluding bis (chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102 <sup>1</sup> , Table 1
	4	Copper, ammonia, phosphorus and hardness
	3	Mercury
	1	BOD5 (five-day biochemical oxygen demand), COD (chemical oxygen demand), chloride, total residual chlorine, oil and grease, pH, total suspended solids, temperature (summer

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		and winter), arsenic, cadmium, chromium, lead, mercury, nickel, zinc
	1	Fecal coliform and pollutants listed in s. NR 215.06 excluding TOC (total organic carbon) when the applicant believes the pollutant is present in the discharge for reasons other than its presence in the intake water
Secondary industry process, cooling water, manufacturing, commercial, mining, or silvicultural discharge or cooling water discharge, or both	4	Copper, ammonia, phosphorus and hardness
	1	BOD5 (five-day biochemical oxygen demand), COD (chemical oxygen demand), chloride, total residual chlorine, oil and grease, pH, total suspended solids, temperature (summer and winter), arsenic, cadmium, chromium, lead, mercury, nickel, zinc
	1	Any of the following pollutants that the applicant believes is present in the discharge for reasons other than its presence in the intake water: Pollutants listed in ss. NR 215.03, 215.05 and 215.06 excluding 2-chloroethyl vinyl ether, dioxin, asbestos and TOC (total organic carbon), pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1
Noncontact cooling water discharge	1	Ammonia, BOD5 (five day biochemical oxygen demand), chloride, oil and grease, pH, phosphorus, total suspended solids and temperature (summer and winter)
	1	Any of the following pollutants that the applicant believes is present in the discharge for reasons other than its presence in the intake water: Pollutants listed in ss. NR 215.03, 215.05 and 215.06 excluding 2-chloroethyl vinyl ether, dioxin, asbestos and TOC (total organic carbon); pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1

<sup>1</sup>Primary industries are required to test only those GC/MS fractions that are specified in 40 CFR 122, Appendix D, revised Table 1.



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## SECTION 5. NR 200.07 (5) is created to read:

**NR 200.07 (5)** In addition to any other information required in a permit application under this chapter, an owner or operator of an industrial facility that is applying for a WPDES permit shall submit the information required of the facility's industrial category:

(a) *Applications for existing manufacturing, commercial, mining and silvicultural dischargers.* Owners or operators of facilities with existing discharges from manufacturing, commercial, mining and silvicultural activities shall include information that is required in 40 CFR 122.21(g) in the permit application.

(b) *Applications for discharges from aquatic animal production facilities.* Owners or operators of aquatic animal production facilities shall include the following information in the permit application:

1. The maximum daily and average monthly flow from each outfall.
2. The number of ponds, raceways, and similar structures.
3. The name of the receiving water and the source of intake water.
4. For each species of aquatic animals, the total yearly and maximum harvestable weight.
5. The calendar month of maximum feeding and the total mass of food fed during that month.

(c) *Applications from new sources and new industrial discharges.* Owners or operators of facilities that are considered new sources or new industrial discharges shall include information that is required in 40 CFR 122.21 (k) in the permit application.

## SECTION 6. NR 200.21 is amended to read:

**NR 200.21 Time deadline for filing variance requests.** (1) *Applications Following Permit Reissuance.* A permittee who wishes to apply for a variance shall submit an application for a variance within 60 days after the department issues, reissues, or modifies the permit.

(2) *Expedited Variance.* Alternatively, a permittee may apply for a variance as part of the application for permit reissuance pursuant to s. 283.15 (2) (a). Any application for a variance under s. 283.15, Stats., shall comply with application requirements of s. NR 200.20. The department may notify a permit applicant before the permit application for reissuance is submitted that the permittee may apply for a variance to the water quality based effluent limitations proposed in the permit or may seek renewal of a variance that has already been granted.

## SECTION 7. NR 205.01 is amended to read:

**NR 205.01 Purpose.** The purpose of this chapter is to set forth the definitions applicable to

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and abbreviations used in chs. NR 200 to 299 to avoid repetition in those chapters. This chapter also sets forth permit general conditions for all WPDES permits, general procedures for calculating permit limits for all WPDES permits, effluent limitations applicable to non-POTW's where pH is continuously monitored, and procedures to be used for issuing general WPDES permits.

SECTION 8. NR 205.067 is created to read:

**NR 205.067 Reasonable Potential for Water Quality Based Effluent Limitations. (1)**

GENERAL. (a) Except as provided in sub. (5), the department shall include effluent limitations for an individual pollutant in a WPDES permit when the department determines that the pollutant is or may be discharged at a level that will cause, has the reasonable potential to cause, or contribute to an excursion above the allowable ambient concentration of a numeric water quality criterion in chapters NR 102 through 104.

(b) Limitations must control all pollutants or pollutant parameters, including conventional, nonconventional, and toxic pollutants, which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard in chapters NR 102 through 104, including narrative criteria for water quality.

(2) FACTORS TO CONSIDER. When determining under sub. (1) whether a pollutant discharged causes, has the reasonable potential to cause, or contributes to an exceedance of a numeric or narrative water quality standard, the department shall consider the following factors:

- (a) Existing controls on the discharge;
- (b) Controls on the pollutant discharged by nonpoint source pollution in the watershed;
- (c) The variability of the pollutant or parameter in the effluent discharged;
- (d) Sensitivity of species to toxicity testing when evaluating whole effluent toxicity as defined in s. NR 106.03; and
- (e) Dilution of the effluent in the receiving water.

(3) WATER QUALITY BASED EFFLUENT LIMITATIONS. If the department determines a limitation is necessary pursuant to this section, the limitation shall:

- (a) Be consistent with a total maximum daily load as defined in 217.11(7) approved by the United States Environmental Protection Agency, if one is in place for the receiving waterbody;
- (b) Ensure achievement of a level of water quality derived from and in compliance with the applicable water quality standard.

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Note: Limitations and procedures for whole effluent toxicity are established in subchapter II of NR 106.

(4) IN ABSENCE OF NUMERIC WATER QUALITY CRITERIA. Where a chemical pollutant, for which a water quality criterion does not exist, is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable water quality standard, effluent limits shall be established using one or more of the following options:

(a) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the department demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using data for a proposed criterion or other relevant information such as EPA's Water Quality Standards Handbook (October 1983), risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents.

(b) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the Clean Water Act, supplemented where necessary by other relevant information.

(c) Establish effluent limits on an indicator parameter for the pollutant of concern, provided each of the following are true:

1. The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation.
2. The fact sheet sets forth the basis for the limit, including a finding that compliance with the effluent limit of the indicator pollutant will result in controls on the pollutant of concern that are sufficient to attain and maintain applicable water quality standards.
3. The permit requires all effluent and ambient monitoring necessary to show that, during the term of the permit, the limit on the indicator parameter continues to attain and maintain applicable water quality standards.
4. The permit contains a reopener clause allowing the department to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(5) EXCEPTION. This section does not apply to pollutants that are subject to the procedures in ch. NR 217 or ch. NR 106.

SECTION 9. NR 205.09 and 205.10 are created to read:

**NR 205.09 Disposal of pollutants into wells, publicly owned treatment works, or by land application.** (1) When part of a discharger's process wastewater is not being discharged into

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surface waters of the state because it is disposed into a well, POTW, or by land application, thereby reducing the flow or level of pollutants being discharged into surface waters of the state, applicable effluent standards and limitations for the discharge in a WPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(a) If none of the waste from a particular process is discharged into surface waters of the state, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(b) In all cases other than those described in par. (a), effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into surface waters of the state, and dividing the result by the total wastewater flow. This method is expressed algebraically as:

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Where:

P is the final, adjusted permit effluent limitation,

E is the limitation derived by applying effluent guidelines to the total wastestream,

N is the wastewater flow to be treated and discharged to surface waters, and

T is the total wastewater flow.

(c) In addition to the adjustment in paragraph (b), effluent limitations and standards may be further adjusted under a fundamentally different factors variance under s. NR 220.20 to make them more or less stringent if discharges to wells, POTWs, or by land application change the character or treatability of the pollutants being discharged.

**(2)** Sub. (1) does not apply to the extent that effluent limitations guidelines:

(a) Control concentrations of pollutants discharged but not mass; or (b) Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

**(3)** This section does not alter a permittee's obligation to meet any more stringent limitations or requirements established under other WPDES permit program regulations.

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**NR 205.10 Best management practices (BMPs).** Best management practices (BMPs) to control or abate the discharge of pollutants must be included in a WPDES permit issued by the department when:

- (1) Authorized under section 33 USC 1314 (e) for the control of toxic pollutants and hazardous substances from ancillary industrial activities.
- (2) Numeric effluent limitations are infeasible;
- (3) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of chapter 283, Wis. Stats.; or
- (4) Authorized under NR 216 for the control of storm water discharges

Note: Chapters NR 243 and 216 also include regulations requiring best management practices for WPDES permittees.

SECTION 10. NR 205.14 is created to read:

**NR 205.14 Schedules of compliance.** The permit may, when appropriate, specify a schedule for compliance leading to compliance with regulations if all of the following apply:

(1) ***Time for compliance.*** Any schedules of compliance under this section shall require compliance as soon as possible and may not extend beyond any applicable federal or state statutory deadlines.

(2) ***Schedules for new dischargers.*** (a) The first permit issued to a new source or a new discharger shall contain a schedule for compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. The department may allow a brief period, not to exceed 90 days from the beginning of discharge, for the discharger to correct pollution control equipment start-up problems.

(b) For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

(3) ***Interim Dates.*** If a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement as follows:

- (a) The time between interim dates shall not exceed 1 year, except that in the case of a schedule

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for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.

(b) If the time necessary for completion of any interim requirement, such as the construction of a control facility, is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

**(4) Reporting.** The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the department in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (3)(b) is applicable.

**Note:** Compliance schedule provisions for phosphorus limitations and other water quality based effluent limitations may differ from the requirements of this section. These provisions can be found in ss. NR 217.17 and 106.117, Wis. Adm. Code, respectively.

SECTION 13. NR 207 Chapter (title) is amended to read:

## CHAPTER NR 207

WATER QUALITY ANTIDegradation AND ANTIBACKSLIDING

SECTION 14. NR 207 Subchapter I (title), inserted before NR 207.01, is created to read:

## SUBCHAPTER I

## ANTIDegradation

SECTION 15. NR 207.01 is amended to read:

**NR 207.01 Purpose and applicability. (1) PURPOSE.** The purpose of this ~~chapter~~subchapter is to establish implementation procedures for the antidegradation policy in s. NR 102.05 (1) (a). This ~~chapter~~subchapter sets procedures applicable to proposed new or increased discharges to outstanding resource waters, exceptional resource waters, Great Lakes system waters, fish and aquatic life waters, and waters listed in tables 3 through 8 in ss. NR 104.05 to 104.10.

**(2) APPLICABILITY.** This ~~chapter~~subchapter applies to any person proposing to increase an existing discharge or create a new discharge to the surface waters of the state.

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SECTION 16. NR 207 Subchapter II, inserted after NR 207.05, is created to read:

**SUBCHAPTER II  
ANTIBACKSLIDING**

**NR 207.10 Purpose.** The purpose of this subchapter is to establish antibacksliding requirements for the WPDES permit program.

**NR 207.11 Definitions.** In addition to the definitions in chs. NR 205, the following definitions apply to this subchapter:

**(1)** “Effluent Limitation Guidelines” or “Effluent Guideline Standard” means guidelines for establishing technology based limitations pursuant to 33 USC 1313(b) including, but not limited to, guidelines for best practicable technology, best conventional pollutant control technology, best available technology, best management practices, new source performance standards and best professional judgment.

Note: The Department’s state statutory authority for establishing technology based guidelines and standards is found in ss. 283.11, 283.13, 283.19, 283.21, Stats.

**NR 207.12 Antibacksliding (1) GENERAL.** Except as provided in this section, effluent limitations, standards, or conditions in a reissued, revoked and reissued, or modified permit must be at least as stringent as the effluent limitations, standards, or conditions in the previous permit. If one of the exceptions in this section is satisfied to relax or backslide a limitation, the limitation may only be made less stringent if all of the following apply:

(a) The less stringent limitation is at least as stringent as required by applicable effluent limitation guidelines.

(b) The less stringent limitation complies with state water quality standards, including the antidegradation requirements in subchapter I, except that antidegradation does not apply to the relaxation of a total maximum daily load limitation or a limitation based on a wasteload allocation in ch. NR 212 in accordance with sub. (3)(c).

Note: Antibacksliding requirements and antidegradation requirements are not applicable when the department relaxes a limitation that has not yet taken effect in a WPDES permit.

**(2) RELAXING A BEST PROFESSIONAL JUDGMENT-BASED LIMITATION.** Effluent

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limitations for a pollutant based on best professional judgment under s. NR 220.21 (1) that have taken effect in a permit may not be made less stringent in a reissued, revoked and reissued, or modified permit upon publication of new effluent limitation guidelines unless sub. (1) is satisfied and one or more of the following apply:

(a) Material and substantial alterations or additions to the permitted facility occurred after the best professional judgment based limitation was initially imposed in the permit, which justify the application of a less stringent effluent limitation;

(b) New information is available which was not available at the time of permit issuance and which would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this subparagraph does not include revised regulations, guidance, or test methods.

(c) The department determines that technical mistakes or mistaken interpretations of law were made when the best professional judgment-based limitation was initially imposed in the permit;

(d) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(e) The permittee has received department approval for any of the following:

1. A modified technology based limitation pursuant to s. 283.13 (3), Stats.,
2. An extended compliance schedule pursuant to s 283.13 (6), Stats.,
3. A modified technology based limitation because the permittee has demonstrated to the department that the permitted facility has fundamentally different factors, other than cost, compared to the factors that were used to establish applicable effluent guidelines based on best professional judgment,
4. An alternate thermal effluent limitation pursuant to s. 283.17 (1), Stats.;

(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the best professional judgment based effluent limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

**Note:** Best professional judgment limitations are technology based limits established on a case-by-case basis by the permit drafter when there are no applicable promulgated effluent guidelines for the category of discharge. They are established under s. NR 220.21, Wis. Adm. Code and 33 USC 1342(a)(1)B of the Clean Water Act.

**Note:** If a permit contains limits based on BPJ and effluent guidelines are subsequently promulgated, limits



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for future production expansions will be based on the effluent guidelines.

**(3) RELAXING A WATER QUALITY BASED LIMITATION OR A LIMITATION BASED ON A STATE TECHNOLOGY BASED STANDARD.** (a) Any effective water quality based effluent limitations, including those based upon a total maximum daily loads or other wasteload allocations, or a limitation based on a state technology based standard may be relaxed in a reissued, revoked and reissued, or modified permit if the antidegradation provisions in subchapter I are satisfied, the requirements of sub. (1) are satisfied, and one or more of the following apply:

1. Material and substantial alterations or additions to the permitted facility occurred after the limitation was initially imposed in the permit which justify the application of a less stringent effluent limitation;

2. Subject to par. (b), new information is available which was not available at the time of permit issuance and which would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this subparagraph includes the establishment of an EPA approved total maximum daily load for the pollutant and receiving water. New information under this subparagraph does not include revised regulations, guidance, or test methods;

3. Subject to par. (b), the department determines that technical mistakes or mistaken interpretations of law were made in the previous imposition of the effluent limitation.

4. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonable available remedy.

5. The permittee has received department approval for any of the following:

- a. A modified technology based limitation pursuant to s. 283.13 (3), Stats.,
- b. An extended compliance schedule pursuant to s. 283.13 (6), Stats.,
- c. A modified technology based limitation because the permittee has demonstrated to the department that the permitted facility has fundamentally different factors, other than cost, compared to the factors that were used to establish applicable effluent guidelines based on best professional judgment,
- d. An alternate thermal effluent limitation pursuant to s. 283.17 (1), Stats.;

6. The initial water quality based limit was based on protection of a receiving water or a downstream water that did not meet the applicable water quality standard and the previously impaired water has now met or exceeded the water quality standard.

7. The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations. In such a case, the effluent limitation in the reissued,

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revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

(b) The relaxation of a water quality based limitation under par.(a) 2. and 3. may not be based upon a revised wasteload allocation used to calculate the water quality based effluent limitation, a revised TMDL, or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of the revised allocation results in a decrease in the amount of pollutants discharged into the receiving waters, and such revised allocations are not the result of a discharger completely or substantially eliminating its discharge of pollutants;

(c) NONATTAINMENT WATERS. Any effective effluent limitation that is based upon a total maximum daily load or other wasteload allocation may also be made less stringent if the permitted discharge is to a receiving water or a downstream water that has not yet attained the applicable water quality standard, and provided at least one of the following applies:

1. Other wasteload allocated limitations for one or more dischargers to the nonattainment receiving water or downstream water are also adjusted so that, cumulatively, the total maximum daily load or wasteload allocations will still assure the attainment of water quality standards; or

2. The designated use which is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the USEPA.

(d) ATTAINMENT WATERS. Any effective permitting standard or water quality based effluent limit, including those based upon a total maximum daily load or other wasteload allocation, may also be made less stringent if the receiving water is in attainment of water quality standards, including designated uses and fulfillment of the antidegradation policy established in subchapter I.

**Note:** The requirements in par. (3) (c) and (d) are based on the provisions of 33 USC 1313(d)(4).

**(4) INTERIM LIMITATIONS, OTHER EFFLUENT LIMITATIONS, STANDARDS, OR CONDITIONS.** Except as provided in sub. (2) or (3), effluent limitations, standards, or conditions in a reissued, revoked and reissued, or modified permit must be at least as stringent as the final effluent limitations, standards, or conditions effective in the previous permit Unless both of the following are met:

(a) Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued

(b) Changes have occurred which would constitute cause for a permit modification or revocation and reissuance under chapter NR 203.

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**Note:** Subsection (4) could apply in cases where other types of technology based limitations (not best professional judgment limitations or state technology based limits) are relaxed. It also could apply to relaxed conditions or interim restrictions in a permit. All allowances to relax a limitation under subs.(2) through (4) are subject to the general backsliding requirements of subsection (1).

SECTION 17. NR 210.05 (5) is created to read:

(5) When determining whether more stringent effluent limitations are required under this section to meet water quality standards for the water receiving the treated discharge, the department shall apply the reasonable potential procedures in s. NR 205.067.

SECTION 18. NR 220.10 is amended to read:

**NR 220.10 Purpose.** The purpose of this subchapter is to provide for the incorporation of effluent limitations into discharge permits required under s. 283.31, Stats., as soon as possible after the promulgation of regulations establishing ~~BCT or BAT~~ effluent limitation guidelines.

SECTION 19. NR 220.12 is amended to read:

**NR 220.12 Definitions.** Terms used in this subchapter are defined in s. NR 205.03. Abbreviations used in this chapter are defined in s. NR 205.04. Other terms are defined as follows:

- (1) “Effluent Limitation Guidelines” are federal or state technology based guidelines or standards that are used to establish effluent limitations for industrial categories or classes of dischargers. They include federal guidelines, standards and limitations that are established pursuant to 33 USC 1311, 1314, 1316, 1318, 1342 and 1361 and state promulgated guidelines, standards and limitations in chs. NR 221 through 298.
- (2) “EPA” means the United States Environmental Protection Agency.

SECTION 20. NR 220.13 is repealed and recreated to read:

**NR 220.13 Establishment of limitations based upon federal regulations.**

(1) INDUSTRIES LISTED IN S. NR 220.02. In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources listed in s. NR 220.02 that is more stringent

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than the applicable state effluent limitation guideline, the department shall include an effluent limitation based on the EPA-promulgated effluent limitation guideline in a WPDES permit for a point source that belongs to the federal category or class of point sources

**(2) INDUSTRIES NOT LISTED IN S. NR 220.02.** In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources not listed in s. NR 220.02, the department shall include an effluent limitation based on the promulgated effluent limitation guideline in a WPDES permit for a point source that belongs to the federal category or class of point sources.

**(3) LESS STRINGENT LIMITATIONS.** If the promulgated federal effluent limitation guideline results in an effluent limitation that is less stringent than an existing applicable technology based limitation contained in a WPDES permit, the department may only include the less stringent limitation if the antibacksliding requirements in chapter NR 207 are satisfied.

**(4) ENFORCEMENT PURPOSES.** Prior to permit issuance, modification, revocation and reissuance, or reissuance, the federally promulgated guidelines shall be used for enforcement purposes except where permit conditions and limitations for the pollutant discharged are based on water quality standards or where standards have been promulgated under s. 283.11 (3), Stats.

SECTION 21. Subchapter IV, inserted after NR 220.21, is created to read:

## SUBCHAPTER IV

## FUNDAMENTALLY DIFFERENT FACTORS VARIANCES

**NR 220.30 Purpose.** (a) The purpose of this subchapter is to establish the criteria and standards to be used in determining whether effluent limitations alternative to those required by chapters NR 221 through 298 or by federal effluent limitation guidelines should be included in a WPDES permit for a discharger because factors relating to the discharger's facilities, equipment, processes, or other factors related to the discharger are fundamentally different from the factors considered by the department or the EPA in development of the effluent limitation guidelines.

(b) This section does not apply to the BPT limitations for steam electric power generating, contained in s. NR 290.12 (1).

**NR 220.31 Authority.** In some cases, it may be necessary to adjust effluent limitation guidelines on a case-by-case basis, making them more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This shall only be done if data specific to the discharger indicates it presents factors fundamentally different from those considered by EPA or the

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department in developing the limit at issue. Any interested person, including the permittee, believing that the factors relating to a discharger's facilities, equipment, processes, or other facilities related to the discharger are fundamentally different from the factors considered during development of the effluent limitation guidelines may request a fundamentally different factors variance. In addition, such a variance may be proposed by the department in the draft permit.

**NR 220.32 Criteria. (1) APPROVABLE VARIANCE REQUESTS.** A request for the establishment of effluent limitations under this subchapter may be approved only if all of the following apply:

(a) There is an applicable effluent limitation guideline which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested.

(b) Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA or the department in establishing effluent limitation guidelines.

(c) The request for alternative effluent limitations or standards is made as part of the permit application and in accordance with the procedural requirements of 40 CFR 124.

**(2) LESS STRINGENT LIMITATIONS.** A request for the establishment of effluent limitations less stringent than those required by effluent limitation guidelines shall be approved only if:

(a) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference; and

(b) The alternative effluent limitation or standard will be consistent with any applicable areawide waste treatment management plan and with any more stringent limitations; and

(c) Compliance with the effluent limitation guidelines, either by using the technologies upon which the effluent limitation guidelines are based or by other control alternatives, would result in:

1. A cost wholly out of proportion to the removal cost considered during development of the effluent limitation guidelines; or

2. A non-water quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the effluent limitation guidelines.

**(3) MORE STRINGENT LIMITATIONS.** A request for alternative limits more stringent than required by effluent limitation guidelines shall be approved only if:

(a) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

(b) Compliance with the alternative effluent limitation or standard would not result in:

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1. A removal cost wholly out of proportion to the removal cost considered during development of the effluent limitation guidelines; or

2. A non-water quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the effluent limitations.

**(4) FUNDAMENTALLY DIFFERENT FACTORS.** Factors which may be considered fundamentally different are:

(a) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater.

(b) The volume of the discharger's process wastewater and effluent discharged.

(c) Non-water quality environmental impact of control and treatment of the discharger's raw waste load.

(d) Energy requirements of the application of control and treatment technology.

(e) Age, size, land availability, and configuration as they relate to the discharger's raw waste load.

(f) Cost of compliance with required control technology.

**(5) UNAPPROVABLE VARIANCE REQUESTS.** A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(a) The infeasibility of installing the required waste treatment equipment within the time the Act allows.

Note: A variance may be approved based on the discharger's inability to ultimately achieve effluent limitations, but not based on the discharger's ability to meet a limit within statutory deadlines.

(b) The assertion that the effluent limitation guidelines cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors listed in sub. (4).

(c) The discharger's ability to pay for the required waste treatment.

(d) The impact of a discharge on local receiving water quality.

**NR 220.33 Application Process. (1)** A written request for a variance under this subchapter shall be submitted as part of the permit application and in accordance with ch. NR 200 or in accordance with sub. (2).

**(2)** Requests for variances from the best available technology economically achievable (BAT), best conventional pollutant control technology (BCT), or both shall be submitted no later than 180 days after the date on which an effluent limitation guideline is published in the *Federal Register* or the state *Administrative Register*.

**(3)** The burden is on the person requesting the variance to explain each of the following:

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(a) How the appropriate criteria of s. 220.32 have been met.

(b) How the factors listed in s. 220.32 regarding the discharger's facility are fundamentally different from the factors EPA or the department considered in establishing the effluent limitation guidelines. The requester should refer to all relevant material and information such as the published development documents in support of the effluent limitation guidelines, all associated technical and economic data collected for use in developing each effluent limitation guideline, all records of legal proceedings, and all written and printed documentation including records of communication, etc., relevant to the regulations that are kept as public records by the department.

(c) How the alternative limitations requested are justified by the fundamental difference alleged in paragraph (b).

SECTION 22. NR 221.05, 225.05, 228.05, 231.05, 236.05, 239.05, 240.05, 245.05, 247.05, 250.05, 258.05, 261.14, 268.05, 269.05, 275.05, 276.05, 277.05, 280.05, 281.05, 284.13, 286.05, 290.13, 294.05, 295.05, and 296.05 are repealed.

## SECTION 23. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

## SECTION 24. BOARD ADOPTION.

The forgoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on \_\_\_\_\_ DRAFT \_\_\_\_\_.

Dated at Madison, Wisconsin \_\_\_\_\_ DRAFT \_\_\_\_\_

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_ DRAFT \_\_\_\_\_  
Cathy Stepp, Secretary